(2)

NO. 05-514

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD,

Petitioner,

v.

RICHARD LAIRD,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

BILLY H. NOLAS, ESQ.
ANGELA ELLEMAN, ESQ.
DAVID WYCOFF, ESQ.
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Federal Community Defender Office for the
Eastern District of Pennsylvania
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Respondent, Richard Laird

Dated: December 14, 2005

RECEIVED
DEC 16 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court grant certiorari in order to review the lower court's routine application of well-established law to the facts of this case?

TABLE OF CONTENTS

COUNTER-STATEMENT OF THE QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

A. Relevant Pennsylvania and Due Process Law 1

B. State Court Proceedings 2

C. Federal Court Proceedings 4

1. District Court 4

2. Third Circuit 6

REASONS FOR DENYING THE WRIT 8

THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COMMONWEALTH'S ONLY QUARREL IS WITH THE THIRD CIRCUIT'S APPLICATION OF A PROPERLY STATED RULE OF LAW TO THE FACTS OF THIS CASE. 8

CONCLUSION 17

TABLE OF AUTHORITIES

FEDERAL CASES

Anderson v. Penn Hall Co., 47 F. Supp. 691 (M.D. Pa. 1942) 16

Boyde v. California, 494 U.S. 370 (1990) 7, 9

Brecht v. Abrahamson, 507 U.S. 619 (1993) 5, 6, 8, 10

California v. Roy, 519 U.S. 2 (1996) 8, 10

Chapman v. California, 386 U.S. 18 (1967) 5

Estelle v. McGuire, 502 U.S. 62 (1991) 6, 7, 9

Everett v. Beard, 290 F.3d 500 (3d Cir. 2002) 1

Francis v. Franklin, 471 U.S. 307 (1985) 6, 7, 9, 10

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916) 8

Kotteakos v. United States, 328 U.S. 750 (1946) 10

Laird v. Horn, 414 F.3d 419 (3d Cir. 2005) 1

O'Neal v. McAninch, 513 U.S. 432 (1995) 8, 10

Smith v. Horn, 120 F.3d 400 (3d Cir. 1997) 1, 7, 8

Watt v. Alaska, 451 U.S. 259 (1981) 8

In re Winship, 397 U.S. 358 (1970) 2, 7

STATE CASES

Commonwealth v. Baskerville, 681 A.2d 195 (Pa.Super. 1996) 12

Commonwealth v. Chester, 733 A.2d 1242 (Pa. 1999) 4

Commonwealth v. Cohen, 605 A.2d 1212 (Pa. 1992) 12

Commonwealth v. Davis, 704 A.2d 650 (Pa.Super. 1997) 12

Commonwealth v. Flaherty, 25 Pa. Super. 490, 1904 WL 3461 (1904) 16

Commonwealth v. Grosso, 162 A.2d 421 (Pa.Super.), aff'd, 165 A.2d 73 (Pa. 1960) 16

Commonwealth v. Hartley, 89 Pa. Super. 230, 1926 WL 4401 (1926) 16

Commonwealth v Huffman, 638 A.2d 961 (Pa. 1994) 1

Commonwealth v. Johnson, 719 A.2d 778 (Pa.Super. 1998) 12

Commonwealth v. Wanamaker, 444 A.2d 1176 (Pa.Super. 1982) 12

Drum v. Shaull Equipment & Supply Co., 760 A.2d 5 (Pa.Super. 2000) 15

Eastley v. Glenn, 169 A. 433 (Pa. 1933) 15, 16

Friedman v. Ralph Brothers, 171 A. 900 (Pa. 1934) 15, 16

Havranek v. Pittsburgh, 25 A.2d 703 (Pa. 1942) 15, 16

Henning v. Keiper, 37 Pa. Super. 488, 1908 WL 3837 (1908) 16

Kramer v. Kister, 40 A. 1008 (Pa. 1898) 15, 16

Kreider v. Wellenbach, 619 A.2d 319 (Pa.Super. 1993) 15, 16

Murphy v. Wolverine Express, Inc., 38 A.2d 511 (Pa.Super. 1944) 15

Pittsburgh v. Dinardo, 189 A.2d 886 (Pa. 1963) 15, 16

Rottmund v. Pennsylvania R. Co., 74 A. 341 (Pa. 1909) 15, 16

Smith v. Jamison, 89 Pa. Super. 99, 1926 WL 4377 (1926) 16

Wellitz v. Thomas, 185 A. 864 (Pa.Super. 1936) 15, 16

For the reasons stated below, this Court should deny the petition for writ of certiorari, which does not present any important federal question but, instead, merely asks this Court to review the lower courts' application of well-established law to the facts of this case.[1]

OPINIONS BELOW

The Pennsylvania Supreme Court's direct appeal opinion is Commonwealth v. Laird, 587 A.2d 1367 (Pa. 1991) ("Laird-1"). The Pennsylvania Supreme Court's post-conviction appeal opinion is Commonwealth v. Laird, 726 A.2d 346 (Pa. 1999) ("Laird-2"). The District Court's opinion, granting habeas relief, is Laird v. Horn, 159 F.Supp.2d 58 (E.D. Pa. 2001) ("Laird-3"). The Court of Appeals' opinion, unanimously affirming the District Court, is Laird v. Horn, 414 F.3d 419 (3d Cir. 2005) ("Laird-4"). The Commonwealth did not seek rehearing.[2]

COUNTER-STATEMENT OF THE CASE

A. Relevant Pennsylvania and Due Process Law: The key element of first-degree murder in Pennsylvania – distinguishing it from second- and third-degree murder – is "specific intent to kill." In a homicide trial, if the jury finds beyond a reasonable doubt that the defendant had specific intent to kill, then it should convict him of first-degree murder. If the jury does *not* find beyond a reasonable doubt that the defendant had specific intent to kill, then it should convict him, at most, of second- or third-degree murder. See 18 Pa.C.S. §§ 306(d), 2502; Commonwealth v Huffman, 638 A.2d 961, 962-64 (Pa. 1994); Everett v. Beard, 290 F.3d 500, 509-11 (3d Cir. 2002); Smith v. Horn, 120 F.3d 400, 410 (3d Cir. 1997); Laird-3 at 81-82; Laird-4 at 422 n.3, 425-26. Jury instructions that allow co-conspirator or accomplice liability for *first-degree* murder, without also

---

[1]The petition for writ of certiorari is cited herein as "*Petition*." Petitioner is referred to as "the Commonwealth." The Commonwealth has filed an Appendix, which is cited herein as "App." followed by the page number. All emphasis herein is supplied unless otherwise indicated. Parallel citations are omitted.

[2]The mandate issued on August 10, 2005. On August 12, 2005, the Commonwealth filed a motion to recall the mandate and to stay re-issuance of the mandate pending this Court's disposition on certiorari. On October 25, 2005, the Third Circuit denied the Commonwealth's motion.

requiring a finding beyond a reasonable doubt that *the defendant* had a specific intent to kill, relieve the Commonwealth of its burden of proving every element of first-degree murder beyond a reasonable doubt and, thus, violate Pennsylvania law and due process under the federal constitutional principles of In re Winship, 397 U.S. 358 (1970), and its progeny. See Commonwealth v. Huffman; Everett v. Beard; Smith v. Horn; Laird-3 at 82-83; Laird-4 at 425-26.

B. State Court Proceedings: Mr. Laird was tried, along with co-defendant Frank Chester, on charges arising from the death of Anthony Milano. The Commonwealth's evidence established that both defendants were present when Mr. Milano was killed, but did not establish which defendant actually was responsible for the killing. Both defendants, Mr. Laird and Mr. Chester, testified at trial. They both admitted that they left the bar with Mr. Milano, and were present when he was killed. Each claimed, however, that he did not kill or intend to kill. Each claimed the other was the killer. Thus, the jury's determination of guilt for first-degree murder should have been a matter of judging the credibility of the two defendants – if the jury believed Mr. Laird, it should have convicted Mr. Chester of first-degree murder and Mr. Laird of no more than second- or third-degree murder; if the jury believed Mr. Chester, it should have convicted Mr. Laird of first-degree murder and Mr. Chester of no more than second- or third-degree murder. See Laird-4 at 421-22, 426, 429.

However, as the Pennsylvania Supreme Court, the District Court and the Third Circuit all found, the jury instructions *relieved the jurors* of the need to make this critical determination – the jury was instructed that if *either* Mr. Laird *or* Mr. Chester had specific intent to kill, then *both* should be convicted of first-degree murder. The instructions thus violated Mr. Laird's due process rights, under In re Winship and its progeny, by relieving the Commonwealth of its burden of proving that *Mr. Laird* possessed the specific intent to kill, the key element of first-degree murder. See Laird-3 at 81-85; Laird-4 at 425-30.

Mr. Laird exhausted this constitutional challenge to the jury instructions in the state courts,

but they denied relief. As the District Court and Third Circuit noted, the state courts treated this claim oddly, with implications for federal habeas review. See Laird-3 at 80; Laird-4 at 422-23.

The state court direct appeals of Mr. Laird and Mr. Chester were consolidated, but they filed separate briefs. Some claims were raised by both of them, other claims were raised by one and not the other. In particular, *Mr. Chester*, but *not Mr. Laird*, asserted that trial counsel was ineffective for failing to raise the due process challenge to the jury instructions. See Laird-1 at 1384. The Pennsylvania Supreme Court rejected *Mr. Chester*'s ineffectiveness claim because "the trial court, when explaining the requirements for first degree murder instructed the jury that specific intent to kill must be found." Laird-1 at 1385.[3]

In the state post-conviction proceedings, *Mr. Laird* raised the due process challenge to the jury instructions, and also raised a Sixth Amendment claim that counsel was ineffective for failing to object to the instructions. This was the first time that *Mr. Laird* raised either the due process claim or the ineffectiveness claim. The Pennsylvania Supreme Court, however, denied *Mr. Laird*'s due process and ineffectiveness claims as "*previously litigated*," saying: "This issue was presented on direct appeal as an allegation of ineffectiveness of trial counsel for failure to object to the charge," i.e., the court held that *Mr. Chester*'s raising an ineffectiveness claim on direct appeal made *Mr. Laird*'s due process and ineffectiveness claims "previously litigated." Laird-2 at 354.

As the District Court and Third Circuit found, see Laird-3 at 80-81; Laird-4 at 422-25, this was a strange, unprecedented use of "previously litigated." If *Mr. Laird* had challenged the instructions on direct appeal, then *Mr. Laird*'s post-conviction claims might properly be deemed "previously litigated." But *Mr. Laird* had *not* challenged the instructions on direct appeal – only *Mr. Chester* had. There is *no* other Pennsylvania case that deems a defendant's claim "previously

---

[3]The state court thus ignored the real issue. It is undisputed that the instructions required "that specific intent to kill be found." The problem is that they allowed *both defendants* to be convicted of first-degree murder based on the specific intent of only *one defendant*. Because the state court later corrected this glaring error and found that *the instructions do violate due process* (see infra), we do not belabor this.

litigated" because it was previously raised by a *co-defendant*. In fact, Laird-2's "previously litigated" ruling on this issue is inconsistent with the court's ruling on another issue that was raised on direct appeal by Mr. Chester, but not Mr. Laird. With respect to that issue, Laird-2 held, correctly, that *Mr. Chester*'s having raised the claim did *not* make it "previously litigated" for *Mr. Laird*. See Laird-2 at 354-55 ("The Commonwealth responds that the issue has been finally litigated .... However, ... *only co-defendant Chester raised this issue*, it has *not* been finally litigated by [Laird].").

The Pennsylvania Supreme Court then decided *Mr. Chester*'s post-conviction appeal, which was litigated separately from Mr. Laird's. Mr. Chester raised the jury instruction error/due process claim, and the Pennsylvania Supreme Court said it was "previously litigated." Commonwealth v. Chester, 733 A.2d 1242, 1253 (Pa. 1999) ("Chester-2"). But the Pennsylvania Supreme Court also held in Chester-2 that *it had erred in its direct appeal ruling*, and that the instructions given in this case *did violate due process* and Pennsylvania law because they relieved the Commonwealth of its burden of proving that each defendant, not just an accomplice, had specific intent to kill. See Chester-2 at 1253 n.12 (citing Commonwealth v. Huffman, supra). The Pennsylvania Supreme Court nevertheless denied relief to Mr. Chester, saying that "prejudice" was not established for an *ineffective assistance of counsel* claim. Id.

C. Federal Court Proceedings: After exhausting state remedies, Mr. Laird filed a petition for writ of habeas corpus in the District Court raising the due process claim and several other constitutional challenges to his conviction and death sentence.

1. **District Court**: After carefully considering the Pennsylvania Supreme Court's strange treatment of Mr. Laird's due process claim, the District Court held that there is no state court "decision" on the merits of that claim within the meaning of 28 U.S.C. § 2254(d). Thus, habeas review of the due process claim is the same *de novo* review that applied before AEDPA. See Laird-3 at 81. The Third Circuit agreed that *de novo* review is appropriate here. See Laird-4 at 423-25.

The Commonwealth does *not* ask this Court to review the holding that the due process claim

should be reviewed *de novo*. See *Petition* at i (question presented seeks *de novo* review of constitutional error). That holding is not challenged.[4]

The District Court also found that there was no adequate and independent state ground barring federal merits review of Mr. Laird's due process claim. See Laird-3 at 80-81. The Third Circuit agreed. See Laird-4 at 425 (affirming the District Court's no-procedural-bar ruling for "the reasons set forth by the district court in its well-reasoned opinion").

The Commonwealth does *not* ask this Court to review the holding that there is no procedural default here. See *Petition* at i (question presented does not seek review of no-procedural-bar ruling). That holding is not challenged.[5]

Having determined that the due process claim is not procedurally barred and is subject to *de novo* review, the District Court described this Court's decisions regarding challenges to the constitutionality of jury instructions:

---

[4]The Commonwealth's concession is appropriate, as this is a case where *de novo* review plainly is required. As stated above, when Mr. Laird presented his *due process* claim to the state court, in post-conviction, the state court declined to consider the *due process* claim Mr. Laird made because it had decided Mr. Chester's *ineffectiveness* claim on direct appeal. Since the state court never actually decided Mr. Laird's *due process* claim, but decided only Mr. Chester's *ineffectiveness* claim, there is no state court decision on Mr. Laird's due process claim. Even if the state court ruling in Mr. Chester's case is deemed a decision for Mr. Laird, it is *not an adverse decision* on Mr. Laird's *due process* claim – in Chester-2 the state court held that these instructions *violate due process*. Thus, there is *no adverse state court decision* on the existence *vel non* of constitutional error – the state court held that *there is constitutional error here*. Moreover, the state court never addressed whether that constitutional error is harmless under either Chapman v. California, 386 U.S. 18 (1967) or Brecht v. Abrahamson, 507 U.S. 619 (1993), ruling instead that it did not establish "prejudice" for an ineffective assistance of counsel claim.

[5]The Commonwealth's concession is appropriate. The no-procedural-bar ruling plainly is correct, as the Pennsylvania Supreme Court's "previously litigated" ruling is not an adequate and independent state ground. The state court applied the "previously litigated" rule to this claim in a way that was utterly inconsistent with the way the rule has been applied in *any other case*, and even inconsistent with the way it was applied to other claims in this case. Moreover, use of the "previously litigated" concept to bar merits review of claims in a capital case was not "firmly established and regularly followed at the time the [purported] default occurred," because the Pennsylvania Supreme Court applied a special no-waiver rule in capital cases. See Laird-3 at 73-75; Laird-4 at 425 & n.7.

> In evaluating a jury instruction, the Court's analysis "must focus initially on the specific language challenged." Francis v. Franklin, 471 U.S. 307, 315 (1985). The Court then considers the allegedly constitutionally infirm language in the context of the jury charge as a whole. Estelle v. McGuire, 502 U.S. 62, 72 (1991). The central inquiry is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." Estelle, 502 U.S. at 72 (quoting Boyde v. California, 494 U.S. 370, 380 (1990)).

Laird-3 at 83 (some citations and quotation marks omitted).

The District Court then applied this Court's law to the jury instructions in this case:

> Upon reviewing the jury instructions in their entirety, the Court concludes that there is a reasonable likelihood that the jury applied the court's instructions in a way that relieved the prosecution of establishing beyond a reasonable doubt that Laird individually harbored a specific intent to kill Milano.

Laird-3 at 84. Thus, the District Court found, the instructions violated due process under In re Winship and its progeny. See id. at 84-85.

The District Court then performed the harmless error analysis this Court requires in habeas cases, which considers whether the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). The District Court concluded: "Upon a review of the record, it cannot be said that the error had no substantial and injurious effect or influence on the jury's verdict." Laird-3 at 85 (quotation marks omitted).

Having found that the jury instructions violated due process by relieving the Commonwealth of its burden of proving every element of first-degree murder beyond a reasonable doubt, and that this constitutional error was not harmless, the District Court granted habeas relief from the first-degree murder conviction. The Commonwealth appealed to the Third Circuit.

2. **Third Circuit**: As stated above, the Third Circuit agreed with the District Court's "well-reasoned opinion" that the due process claim is not procedurally barred, and that habeas review of that claim is *de novo*, see Laird-4 at 423-25, and the Commonwealth does not seek this Court's review of those rulings.

The Third Circuit also agreed with the District Court's "extremely thorough, comprehensive, and well-reasoned opinion" finding that the jury instructions violated due process by relieving the Commonwealth of its burden of proving every element of first-degree murder beyond a reasonable doubt, and that the constitutional error was not harmless. Laird-4 at 421.

The Third Circuit, like the District Court, first described Mr. Laird's due process claim:

> In In re Winship, 397 U.S. 358 (1970), the Supreme Court held that due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364. Laird argues that the jury instructions pertaining to accomplice liability for first-degree murder relieved the Commonwealth of its burden of proving beyond a reasonable doubt that he intended to kill Milano.

Laird-4 at 425.

The Third Circuit, like the District Court, then cogently summarized this Court's precedent regarding challenges to the constitutionality of jury instructions:

> On habeas review, we must analyze the challenged portions of the jury instruction in context with the entire charge and determine "whether there is a *reasonable likelihood* that the jury has applied the challenged instructions in a way that violates the Constitution."

Laird-4 at 425-26 (quoting Smith v. Horn, 120 F.3d 400, 411 (3d Cir. 1997) (quoting and citing, *inter alia*, Estelle v. McGuire, 502 U.S. 62, 72 (1991); Boyde v. California, 494 U.S. 370, 380 (1990); Francis v. Franklin, 471 U.S. 307, 315 (1985))) (emphasis in Laird-4).

The Third Circuit, like the District Court, then painstakingly reviewed the instructions as a whole, and concluded that the instructions violated due process because it was reasonably likely that the jury applied them in a way that relieved the Commonwealth of its burden of proving beyond a reasonable doubt that Mr. Laird possessed a specific intent to kill, an element of the offense of first-degree murder. See Laird-4 at 426-28.

The Third Circuit, like the District Court, recognized that the finding of a due process violation "does not ... end our enquiry. We must still determine if the error was harmless." Laird-4 at 428. The Third Circuit set forth this Court's harmless error law in the habeas context:

> In determining whether this error was harmless, we must examine whether it "had a 'substantial and injurious effect or influence' on the verdict." If our analysis causes us "grave doubt" about the integrity of the verdict, it can not be deemed harmless, and Laird is entitled to relief.

Laird-4 at 428 (citations omitted) (quoting Smith, 120 F.3d at 418 (quoting and citing California v. Roy, 519 U.S. 2 (1996) (per curiam); O'Neal v. McAninch, 513 U.S. 432 (1995); Brecht v. Abrahamson, 507 U.S. 619 (1993))). The Third Circuit then carefully examined the record and the Commonwealth's arguments, and found that the error was not harmless. See Laird-4 at 428-30.

Having found that the jury instructions violated due process by relieving the Commonwealth of its burden of proving every element of first-degree murder beyond a reasonable doubt, and that this constitutional error was not harmless, the Third Circuit affirmed the District Court's grant of habeas relief from the first-degree murder conviction. See Laird-4 at 430.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COMMONWEALTH'S ONLY QUARREL IS WITH THE THIRD CIRCUIT'S APPLICATION OF A PROPERLY STATED RULE OF LAW TO THE FACTS OF THIS CASE.

A writ of certiorari is "granted only for compelling reasons." Supreme Court Rule 10. This Court's certiorari jurisdiction is "exercised sparingly, and only in cases of peculiar gravity and general importance." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). In particular, this Court does not grant the writ simply to correct purported error by the lower court, which is what the Commonwealth asks this Court to do here. See Watt v. Alaska, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring) ("certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases"); R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 190-91 (6th ed. 1985) (same).

A. The District Court and Third Circuit, after carefully considering the Pennsylvania Supreme Court's treatment of this claim, determined that: (1) there is no adequate state ground barring federal merits review; and (2) habeas review is *de novo*, rather than through the lens of 28 U.S.C. § 2254(d). See Counter-Statement of the Case § C. The Commonwealth does not seek this

Court's review of those determinations.

B. The District Court and Third Circuit accurately identified and described this Court's due process law. See Counter-Statement of the Case § C. The Commonwealth does not seek review of the lower courts' understanding of this Court's due process decisions.

C. The District Court and Third Circuit accurately identified and described this Court's law for evaluating the constitutionality of jury instructions – e.g., Estelle v. McGuire, 502 U.S. 62 (1991); Boyde v. California, 494 U.S. 370, 380 (1990); Francis v. Franklin, 471 U.S. 307 (1985) – which requires the reviewing court to consider the "constitutionally infirm language" in the context of the jury charge as a whole and determine if there is a "reasonable likelihood" that the jury has applied the challenged instruction in a way that violates the Constitution. See Counter-Statement of the Case § C. The District Court and Third Circuit found that the instructions as a whole created a reasonable likelihood that the jury applied those instructions in a way that violated due process.

The Commonwealth's certiorari petition *admits* that the instructions given here *contained "constitutionally infirm language."* See *Petition* at i (question presented admits that jury was given an "*ailing* accomplice liability instruction").

The Pennsylvania Supreme Court *found* that the instructions given here relieved the Commonwealth of its burden of proving every element of the offense beyond a reasonable doubt. See Counter-Statement of the Case § B.[6]

The Commonwealth's quarrel with the District Court and Third Circuit, then, seems to be about whether the instructions "as a whole" adequately cured the instructional infirmity that the state and federal courts found and that the Commonwealth admits exists. The Pennsylvania Supreme Court did not believe there was such a cure, and the District Court and Third Circuit reviewed the

---

[6]When the Commonwealth attempted to defend the instructions in the lower court, the Third Circuit noted that, "[g]iven [the Pennsylvania Supreme] Court's recognition of the obvious problems with this charge, the Commonwealth's rather obstinate defense of the instruction is perplexing." Laird-4 at 424 n.6.

instructions as a whole and found a reasonable likelihood that the jury understood those instructions as a whole in a way that violates due process. Thus, even if viewed in the light most favorable to the Commonwealth, the "asserted error consists of ... the misapplication of a properly stated rule of law" to the facts of this case, which is not a reason to grant certiorari. Supreme Court Rule 10.

Moreover, the Commonwealth's argument is baseless. The Commonwealth sifts through the jury charge searching for nuggets that suggest a specific intent requirement. Ironically, the Commonwealth thus ignores the very principle that it espouses – that jury instructions must be viewed *as a whole*. The presence of passages that may correctly state the law does not negate the reasonable likelihood that the jury unconstitutionally applied the instructions unless the court *corrects* the erroneous parts of the instructions. See Francis, 471 U.S. at 322 ("Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict."). The District Court and Third Circuit, applying this Court's settled law, recognized this and found a due process violation. See Laird-3 at 83; Laird-4 at 425-26.

D. The District Court and Third Circuit accurately set forth this Court's harmless error law, as it applies in the habeas context, e.g., California v. Roy, 519 U.S. 2 (1996) (per curiam); O'Neal v. McAninch, 513 U.S. 432 (1995); Brecht v. Abrahamson, 507 U.S. 619 (1993); Kotteakos v. United States, 328 U.S. 750 (1946); applied that law to the facts of this case; and found that the error is not harmless. See Counter-Statement of the Case § C. The Commonwealth dislikes the outcome but, again, the "asserted error consists of ... the misapplication of a properly stated rule of law," which is not grounds for granting certiorari, Supreme Court Rule 10, especially for a fact-intensive matter like harmless error review.

Moreover, the Commonwealth's harmless error argument is baseless. This case is a text-book example of error that is *not* harmless. Here, where the evidence suggested that both defendants were involved in some type of wrongdoing, both defendants testified, both defendants admitted they

were present during the offense, both defendants claimed no intent to kill, both defendants claimed that the other was the killer, *etc.*, the jury should have been faced with the difficult task of making credibility determinations and deciding beyond a reasonable doubt whether Mr. Laird, Mr. Chester, both or neither had specific intent to kill. Instead, the jury instructions unconstitutionally relieved the jurors of this difficult task and gave them an easy way out – convict *both* defendants of first-degree murder if you think *either* had specific intent. Under the circumstances of this case, considering the entire record, this constitutional error is not harmless.

While this case plainly is not worthy of this Court's review, we feel compelled to point out the misunderstanding of the record upon which the Commonwealth bases some of its harmless error argument. The Commonwealth says Mr. Laird was convicted of conspiracy to commit *first-degree* murder, and says this shows that the jury necessarily found that he had a specific intent to kill. See *Petition* at 19-20. As the Third Circuit found, see Laird-4 at 428, the Commonwealth's claim is contrary to the record. Mr. Laird was *not* convicted of conspiracy to commit *first-degree* murder. Instead, he was convicted of conspiracy to commit murder generally.

The jury was *not even instructed* on conspiracy to commit *first-degree* murder. Instead, the instructions were for conspiracy to commit murder generally. See NT 5/20/88 at 694-95 ("The defendants are also charged ... with the offense of conspiracy to commit the crime of murder"). The jury returned its verdict in open court, and convicted only of conspiracy to commit murder generally. See NT 5/20/88 at 726, App. 182a-183a ("Court Clerk: How say you with respect to the charge of conspiracy to commit *murder*? Do you find the defendant guilty or not guilty? Jury Foreperson: Guilty."). This verdict of conspiracy to commit murder generally was confirmed by a jury poll. See NT 5/20/88 at 729-30, App. 186a-187a. After the jury gave this verdict, the judge asked if there were any objections and the Commonwealth approved the verdict as stated by the jury in open court. See NT 5/20/88 at 730, App. 187a-188a. The court again asked the jurors if they agreed with the verdict as stated; they all concurred; and the verdict was recorded. See NT 5/20/88 at 731, App.

188a. The conviction plainly was for conspiracy to commit murder generally, *not* conspiracy to commit first-degree murder.

There is a significant difference between what the Commonwealth says Mr. Laird was convicted of (conspiracy to commit first-degree murder) and what he actually was convicted of (conspiracy to commit murder). This difference is significant because "conspiracy to commit murder includes conspiracy to commit *third-degree* murder," which does *not* require specific intent to kill but, instead, may be found when the defendant has "an intention merely to inflict grievous bodily harm, and *not* to take human life." Commonwealth v. Cohen, 605 A.2d 1212, 1217 (Pa. 1992).[7] Thus, the conspiracy to commit murder conviction shows, at most, that the jury believed Mr. Laird agreed to "inflict grievous bodily harm." The facts at trial are consistent with such a verdict – e.g., the odd, drink-induced behavior of Mr. Laird and Mr. Chester at the bar; the fact that the defendants and Mr. Milano left the bar together in one car; the conflicting testimony of the co-defendants about what happened at the scene; and so on. The verdict does *not* show that the jury found beyond a reasonable doubt that Mr. Laird had specific intent to kill.

The Commonwealth gives two purported bases for its claim that Mr. Laird was convicted of conspiracy to commit first-degree murder, despite the record's clear showing to the contrary.

---

[7]See also id., 605 A.2d at 1214, 1216 (defendant convicted of third-degree murder and conspiracy to commit murder where the "Commonwealth presented three co-conspirator witnesses who testified that Cohen solicited them and paid them $700 to kill the victim," and defendant "testified that he sought the help of the co-conspirators to scare the victim, and that he paid them $700 to do so," but "maintained that he only wanted [the victim] 'shoved around' or 'messed up'"); Commonwealth v. Wanamaker, 444 A.2d 1176, 1178 (Pa.Super. 1982) ("conspiracy to commit murder" when defendant agrees to actions that show "a conscious disregard of a great risk that he might have inflicted death or serious bodily harm"); Commonwealth v. Johnson, 719 A.2d 778, 781, 785-86 (Pa.Super. 1998) (conspiracy to commit third-degree murder where defendant supplied baseball bats, talked about smashing people's heads into street curbs and participated in one beating); Commonwealth v. Davis, 704 A.2d 650 (Pa.Super. 1997) (conspiracy to commit third-degree murder where defendant and others conducted "brutal attack" with baseball bats); Commonwealth v. Baskerville, 681 A.2d 195, 201 (Pa.Super. 1996) (conspiracy to commit third-degree murder where victim was shot; "despite the fact that an individual co-conspirator *did not contemplate to kill*, where a killing is a natural and probable consequence of a co-conspirator's conduct, murder is not beyond the scope of the conspiracy").

First, the Commonwealth claims that "it is a legal impossibility in Pennsylvania to be convicted on conspiracy to commit ... murder in the third degree." *Petition* at 20. But, as the above-cited cases show, Pennsylvania *does* recognize conspiracy to commit third-degree murder – e.g., when one agrees to "inflict grievous bodily harm," but not to kill.

Second, the Commonwealth has submitted four handwritten sheets of paper to the Court, App. 189a-192a, based upon which it makes an extraordinary claim. The Commonwealth says these sheets of paper are a "charge sheet that went out to the jury." *Petition* at 19. The Commonwealth says that a letter "G" marked on this so-called "charge sheet" shows that the jury did not *really* convict Mr. Laird of conspiracy to commit murder generally – the verdict that the jury announced in open court, that the jurors affirmed in individual polling, that the prosecutor agreed to and that was recorded. The Commonwealth says these papers show that the jury *really* convicted Mr. Laird of a *different* offense – conspiracy to commit *first-degree* murder. See *Petition* at 19-20. This is utterly baseless.

The Commonwealth proffered this so-called "charge sheet" for the first time *after the Third Circuit had already heard oral argument* in this case. The case was argued and submitted for decision on September 28, 2004. Eight months later, on May 23, 2005, the Commonwealth sought leave to file a "supplemental appendix" containing this so-called "charge sheet." The Commonwealth had never before mentioned this so-called "charge sheet," and had never before attempted to make it part of the record. On July 19, 2005, the Third Circuit *denied the Commonwealth's motion for leave to file the "supplemental appendix"* containing this so-called "charge sheet." The Commonwealth did not seek rehearing of the Third Circuit's order and does not challenge the propriety of that order in its certiorari petition.[8] Thus, the so-called "charge sheet" is not part of the record in this case, and is not properly before this Court.

---

[8]Given the lateness of the Commonwealth's submission and the other matters described below, it plainly was correct for the Third Circuit to deny the Commonwealth's motion for leave to file the so-called "charge sheet."

Even if the so-called "charge sheet" were part of the record, the Commonwealth's arguments about it are baseless (so baseless, in fact, that we were surprised to see the Commonwealth make them here). There is no evidence whatsoever that the papers submitted by the Commonwealth actually are a "charge sheet" that went out with the jury in this case. Even if it is assumed that they are, there is no evidence that the "G"s on those papers were written by *anyone on the jury* – the papers are not signed or labeled in any way that suggests who wrote the "G"s.

Even if it is assumed, with no evidence, that the papers submitted by the Commonwealth were a "charge sheet" *and* that the "G"s on those papers were written by someone on the jury, there is no reason to believe that the "G"s were written as a sign that the jury unanimously found guilt by proof beyond a reasonable doubt – e.g., the papers do not say that "G" means guilty beyond a reasonable doubt; they do not say the "G"s are intended to be anything other than doodles; they do not say that every juror agreed that the charge was proved beyond a reasonable doubt; they do not say anything like "We, the jury do hereby find"; they do not say the "G"s were written at the end of deliberations; they are not signed by anyone, let alone all the jurors.

If we assume for the sake of argument that "G" means guilty beyond a reasonable doubt, the papers submitted by the Commonwealth are *facially inconsistent* with the jury's actual verdict as announced in open court (even aside from the inconsistency regarding conspiracy to commit murder) – the Commonwealth's papers do not have *any* "G"s on the list of homicide charges against Mr. Chester, but the jury *convicted* Mr. Chester of first-, second- and third-degree murder, see NT-5/20/88 at 723, App. 178a-179a; the Commonwealth's papers do not have *any* "G"s on the second- and third-degree murder charges against Mr. Laird, but the jury *convicted* Mr. Laird of second- and third-degree murder, see NT-5/20/88 at 726, App. 182a. The papers on their face thus show that they *do not reflect the jury's actual verdict*. Indeed, if the Commonwealth takes its current argument seriously, it should demand the immediate release of Mr. Chester who, according to the Commonwealth's current argument, really was *acquitted* of all homicide charges. Needless to say,

in Mr. Chester's case, the Commonwealth is not making this "charge sheet" argument, but is relying on the verdict stated in open court.

In short, there is no evidence that the papers submitted by the Commonwealth are an actual "charge sheet" that actually reflects the jury's verdict. The evidence is to the contrary.

Even if the Commonwealth had submitted an *actual charge sheet* it would not help the Commonwealth, given the verdict that was delivered by the jury in open court, affirmed by the jury poll, agreed to by the prosecutor himself, and then recorded.

Under Pennsylvania law, a party waives any claim that the verdict was actually different from the verdict delivered by the jury in open court, unless that party objects to the verdict as stated by the jury *before it is recorded*. See Havranek v. Pittsburgh, 25 A.2d 703, 705 (Pa. 1942); Friedman v. Ralph Bros., 171 A. 900, 901 (Pa. 1934); Rottmund v. Pennsylvania R. Co., 74 A. 341, 343-44 (Pa. 1909); Murphy v. Wolverine Express, Inc., 38 A.2d 511, 513 (Pa.Super. 1944); 10 STANDARD PENNSYLVANIA PRACTICE 2d § 60:5. Here, the Commonwealth did *not* object to the jury's stated verdict before it was recorded; instead, the Commonwealth *agreed that the verdict as stated by the jury was proper*. See NT 5/20/88 at 730, App. 188a. The Commonwealth cannot now impeach the jury's verdict by claiming that it was different from the verdict to which the Commonwealth agreed.

The Commonwealth's attempt to impeach the jury's actual verdict also fails on its merits. "Under Pennsylvania law, it is well settled that the *only verdict* is that which is *announced orally in court by the jury*.'" Drum v. Shaull Equipment & Supply Co., 760 A.2d 5, 11 (Pa.Super. 2000) (quoting Barefoot v. Penn Central Transp. Co., 323 A.2d 271, 272 (Pa.Super. 1974)).[9] In particular, "the *contents of a verdict slip have absolutely no bearing on the final verdict rendered by a jury*.

---

[9]Accord Pittsburgh v. Dinardo, 189 A.2d 886, 887-88 (Pa. 1963); Havranek, 25 A.2d at 705; Friedman, 171 A. at 901; Eastley v. Glenn, 169 A. 433, 434 (Pa. 1933); Kramer v. Kister, 40 A. 1008, 1009 (Pa. 1898); Kreider v. Wellenbach, 619 A.2d 319, 321 (Pa.Super. 1993); Wellitz v. Thomas, 185 A. 864, 865 (Pa.Super. 1936); 10 STANDARD PENNSYLVANIA PRACTICE 2d § 60:5 ("Only the oral verdict rendered in open court, when received and recorded, constitutes the valid and legal verdict."); see also note 10, infra (citing other authorities).

The *only verdict is the jury's oral pronouncement*." Kreider, 619 A.2d at 322 (citing Barefoot; Oblon v. Ludlow-Fourth Corp., 595 A.2d 62 (Pa.Super. 1991).[10] Here, "the jury's oral pronouncement" was guilty of conspiracy to commit murder generally, and any purported "charge sheet" has "absolutely no bearing" on that verdict.

E. In sum, the District Court and Third Circuit properly stated the law, applied it to the facts, and rejected the Commonwealth's arguments. The Commonwealth dislikes the outcome, but that is not grounds for granting certiorari.

---

[10]Accord Havranek, 25 A.2d at 705; Friedman, 171 A. at 901; Rottmund, 74 A. at 343 ("[T]he jury ... announced their verdict orally ... and ... it was accepted by the court and recorded. ... It was wholly immaterial that the verdict rendered was not in accord with the written formula sent out with the jury and returned by them. The verdict announced orally in court, accepted by it, and entered on the minutes, and not that stated in the written formula, was the verdict of the jury. ... [T]he verdict as recorded is the verdict of the jury, and ... the form prepared in the jury room, though handed to the clerk, is no part of the record, and has no significance whatever. ... The verdict had been entered on the record in proper form, ... and the pencil memorandum was without the slightest legal significance."); Wellitz, 185 A. at 865; Commonwealth v. Grosso, 162 A.2d 421, 428 (Pa.Super.) ("A written memorandum of findings of a jury, although filed and preserved, is not part of the record. The only verdict is that which the jury announces orally and which is received and recorded as the jury's findings."), aff'd, 165 A.2d 73 (Pa. 1960); Commonwealth v. Hartley, 89 Pa.Super. 230, 1926 WL 4401, *2 (1926) ("The real verdict in this case was the one announced orally by the foreman in open court and not the [charge sheet] .... It has been repeatedly held that in criminal as well as civil cases the ... the verdict so received and recorded, and not the written memorandum of their finding, is the true verdict."); Smith v. Jamison, 89 Pa.Super. 99, 1926 WL 4377, *5 (1926); Henning v. Keiper, 37 Pa.Super. 488, 1908 WL 3837, *2 (1908) ("Allusion is made in the appellee's argument to the written memorandum of their finding brought into court by the jury, but it is well settled ... that such paper, although filed and preserved, is no part of the record. The only verdict is that which the jury announced orally and which alone is received and recorded as the jury's finding."); Commonwealth v. Flaherty, 25 Pa.Super. 490, 1904 WL 3461, *3 (1904) ("The form prepared in the jury room, or handed in the first instance to the clerk, has no significance whatever and is no part of the record."); Dinardo, 189 A.2d at 888 (same); Eastley, 169 A. at 434 (same); Kramer, 40 A. at 1009-10 (same); Anderson v. Penn Hall Co., 47 F.Supp. 691, 692 (M.D. Pa. 1942) ("It is well settled that the only verdict is that which the jury announces orally in Court and which is received and recorded at the direction of the Court as the finding of the jury. ... [E]xplanations or comments in a written verdict are no part of the verdict of the jury but are mere surplusage." (citations omitted)); 10 STANDARD PENNSYLVANIA PRACTICE 2d § 60:6 ("The oral verdict returned by the jury to the court cannot be controlled by a verdict that is written in the jury room and that is handed in at the same time. The paper returned by the jury has no significance as the verdict.").

CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully submitted,

BILLY H. NOLAS, ESQ.
ANGELA ELLEMAN, ESQ.
DAVID WYCOFF, ESQ.
Assistant Federal Defenders
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Federal Community Defender Office for the
Eastern District of Pennsylvania
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

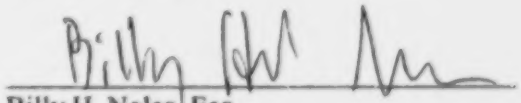
Counsel for Respondent, Richard Laird

Dated: December 14, 2005

CERTIFICATE OF SERVICE

I, Billy H. Nolas, Esq., certify that on this 14th day of December, 2005, I have caused the foregoing brief in opposition to be served by FIRST CLASS MAIL on the following person:

Diane E. Gibbons
Bucks County District Attorney
Bucks County Courthouse
Fourth Floor
55 East Court Street
Doylestown, PA 18901
(Counsel for Petitioner)



Billy H. Nolas, Esq.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 20, 2005

Ms. Diane E. Gibbons
Bucks County Courthouse
Fourth Floor
55 East Court Street
Doylestown, PA 18901

Re: Martin Horn, Commissioner, Pennsylvania Department of Corrections, et al.
v. Richard Laird
No. 05-514

Dear Ms. Gibbons:

The petition for a writ of certiorari in the above entitled case was filed on October 17, 2005 and placed on the docket October 20, 2005 as No. 05-514.

Forms are enclosed for notifying opposing counsel that the case was docketed.

Sincerely,

William K. Suter, Clerk

by

Clayton Higgins
Case Analyst

Enclosures

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 20, 2005

Clerk
United States Court of Appeals for the Third Circuit
601 Market Street, Room 21400
Philadelphia, PA 19106

Re: Martin Horn, Commissioner, Pennsylvania Department of Corrections, et al.
v. Richard Laird
No. 05-514
(Your No. 01-9012)

Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on October 17, 2005 and placed on the docket October 20, 2005 as No. 05-514.

Sincerely,

William K. Suter, Clerk

by

Clayton Higgins
Case Analyst